No. 03-9560

Supreme Court, U.S.
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# In The Supreme Court of the United States

**MARLON HOWELL,**

*Petitioner,*

**v.**

**STATE OF MISSISSIPPI,**

*Respondent.*

**On Writ of Certiorari to the Supreme Court of Mississippi**

## REPLY BRIEF FOR MARLON HOWELL, PETITIONER

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## PETITIONER'S REPLY MEMORANDUM

**PETITIONER'S REQUESTED JURY INSTRUCTIONS, THE TRIAL COURT'S DENIAL OF THE REQUESTS, THE INSTRUCTIONS AS GIVEN, AND THE OBJECTIONS AS ASSERTED IN THE TRIAL COURT AND ON DIRECT APPEAL PROPERLY RAISED AND PRESERVED FEDERAL CONSTITUTIONAL CLAIMS BEFORE THE LOWER COURTS, PERMITTING THE EXERCISE OF THIS COURT'S JURISDICTION PURSUANT TO 28 U.S.C. § 1257.**

Respondent attempts to deny Petitioner's preservation of the important constitutional issue before this Court by focusing on one aspect of the jury instructions and failing to view the instructions in context and the record in its entirety. In its brief, Respondent erroneously argues that jurisdiction does not exist in this Court and that "there is absolutely nothing in the state-court record to remotely indicate that Howell raised this claim for consideration below." (Respondent's Brief, p.17). At the trial level and in the Mississippi Supreme Court, Petitioner framed and raised the question in precisely the same manner as this Court recognized in *Beck v. Alabama*, 477 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980).

The Mississippi Supreme Court acknowledged:

[o]n appeal, Howell specifically argue[d] that:

> The jury could have found then returned to the lesser included offense of simple murder or manslaughter. ... the [c]ourt's failure to instruct the jury on the lesser included offense of simple murder and manslaughter was error. The jury as instructed had no choice but either to turn Howell

loose or convict him of [c]apital murder. ...

*Howell v. State*, 860 So.2d 704, 744 (Miss. 2003). *Compare, Beck v. Alabama*, 477 U.S. at 629, 100 S.Ct. at 2385, 65 L.Ed.2d 392 (1980) (holding unconstitutional the practice under which "the jury is given the choice of either convicting the defendant of the capital crime, in which case it is required to impose the death penalty, or acquitting him, thus allowing him to escape all penalties for his alleged participation in the crime.").

In an effort to avoid this Court's proper exercise of its jurisdiction to review this claim of "constitutional proportions," the Respondent attempts to parse, segregate and separate the jury instructions and the arguments raised with respect to those instructions. Respondent even goes so far as to assert in a footnote that there must be a citation to something, implying that the jury instructions and the arguments concerning them did not reference the Eighth and Fourteenth amendments or implicate the decisions of this Court under the Eighth and Fourteenth amendments to the United States Constitution. Such a contention is fallacious.

Petitioner recognizes, as the Mississippi Supreme Court did, that"[j]ury instructions are to be read together and taken as a whole with no one jury instruction taken out of context." *Howell v. State*, 860 So.2d at 745, quoting *Humphrey v. State,* 759 So.2d 368, 380 (Miss. 2000). Accordingly, at trial and on appeal, the arguments with respect to the jury instructions were of necessity completely interrelated. (J.A. 17-20, 33, 40; T. 975, 982-983, 989-1000).

Within that interwoven fabric, Howell contended the absence of evidence of a robbery and the lack of a



statutory enumeration of attempted robbery as an underlying offense for conviction of capital murder, entitled him to an instruction on simple murder as well as manslaughter. Thus, Howell's trial and appellate counsel argued that "to allow Howell to be convicted of [c]apital [m]urder when the underlying offense is 'attempted robbery' violates his Eight[h] and Fourteenth Amendment rights." Appellant's Brief to the Supreme Court for the State of Mississippi, No. 2001-DP-1104-SCT, 100, *citing Richmond v. Lewis,* 506 U.S. 40, 113 S.Ct. 28, 121 L.Ed.2d 411 (1992); *Godfrey v. Georgia,* 446 U.S.420, 427-28, 100 S.Ct. 1759, 1767-1772, 64 L.Ed.2d 398 (1980); *Gregg v. Georgia,* 428 U.S. 153, 187, 96 S.Ct. 2909, 2937, 49 L.Ed.2d 859 (1976); *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Recognizing in the fact-finding process the nexus between determining whether to convict or acquit the defendant of capital murder and whether to convict on a lesser included offense, this Court analyzed the application of the very cases which Howell cited. *See Beck v. Alabama,* 447 U. S. at 639 - 41, 100 S.Ct. at 2390-2391(pointing out that the State's argument that because a jury is led to believe that a death sentence will automatically follow a finding of guilt, the jurors would be more likely to return a verdict of not guilty rather than to convict, arises from the State's misreading of the cases striking down mandatory death penalties and analyzing those cases).

Accordingly, in *Beck,* as here, "the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction. ... a risk [which] cannot be tolerated in a case in which the defendant's life is at stake." *Beck* at

637, 100 S.Ct. at 2389. This failure presents squarely the violation of this federal due process procedural safeguard, which was raised in the lower court, and which is "especially important in a case such as this." *Id.* It clearly establishes that the issue was presented below, and that this Court may exercise its jurisdiction pursuant to 28 U.S.C. § 1257.

Finally, Respondent attempts to argue, however, that because the Mississippi Supreme Court did not specifically address *Beck* itself, but cited its own decisions which referred to *Beck*, jurisdiction is somehow lacking. This argument fails to recognize that such an ambiguous basis for the state court's ruling does not establish clearly an independent and adequate state ground effectively excluding the exercise of this Court's jurisdiction.[1] *Michigan v. Long*, 463 U.S. 1032, 1040-1041, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201 (1983). *Cf., Ake v. Oklahoma*, 470 U.S. 68, 75,105 S.Ct. 1087, 1092, 84 L.Ed.2d 53, (1985)("[W]when resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded.") citing *Enterprise Irrigation*

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[1] Even in absence of citation to specific federal decisions with respect to the issue, review would be permissible, and a due process violation may still be raised in this Court. *See generally, Vachon v. New Hampshire*, 414 U.S. 478, 94 S.Ct. 664, 38 L.Ed.2d 666 (1974).

There, the Court reversed a state criminal conviction on grounds, not raised in state court, of a violation of the Due Process Clause of the Fourteenth Amendment. The Court indicated in a footnote, *id.*, at 479 n.3, 94 S.Ct. at 665 n.3, that it possessed discretion to ignore the failure to raise the question in state court. *See also, Terminiello v. Chicago*, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949) (reversal of a state criminal conviction on a ground not urged in state court).



*District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164, 37 S.Ct. 318, 320, 61 L.Ed. 644 (1917) ("But where the non-Federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain").

## CONCLUSION

Based on the above reasons as well as those set forth in Petitioner's Brief previously submitted to this Court, Petitioner respectfully requests this Court to consider these issues as to the Eighth and Fourteenth Amendment claims raised before the Mississippi Supreme Court for purposes of 28 U.S.C. §1257. For the foregoing reasons, the judgment of the Mississippi Supreme Court must be reversed.

Dated: October 13, 2004

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